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No. 07-690

FILED
DEC 2 6 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

DUCHESNE CITY, CLINTON PARK, Mayor, YORDYS NELSON, NANCY WAGER, PAUL TANNER, DARWIN McKEE, and JEANNIE MECHAM, City Council Members,

Petitioners,

v.

SUMMUM, a corporate sole and church,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA, EIGHT OTHER STATES, AND PUERTO RICO AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

The States' Amici Brief in support of the Petition addresses the following questions:

1. When government accepts a donation of property and then uses the property for expressive purposes, is the expression considered government speech?

2. If government accepts a donation of property and then installs that property in a public park, does the government create a public forum for the installation of structures?

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INTEREST OF AMICI[1]

The States' interest is clear – preserving the sovereign authority of the States and their political subdivisions to engage in *government* speech. If it is inevitable that government will "adopt and pursue programs" that "are contrary to the profound beliefs and sincere convictions of some of its citizens," it is equally "inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." *Board of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 229 (2000). When the government speaks, "different principles" control. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 834 (1995). Government speech takes many forms including defense of its own "values," *Rust v. Sullivan*, 500 U.S. 173, 194 (1991), determinations of excellence, *National Endowment for the Arts v. Finley*, 524 U.S. 569, 585-86 (1998), and a public library's "traditional role in identifying suitable and worthwhile material," *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 208 (2003). Although most government speech will involve the expenditure of public funds, there are instances when government speaks by accepting a donation of personal, real, or intellectual property from private interests and then using that property to perpetuate the government's message. The use of property for

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file.

government expression is constitutionally indistinguishable from the use of public funds for government expression. If government can spend money to purchase newspaper and radio advertisements saying "immunize your child," government can accept a donation of a privately financed billboard that reads "immunize your child." Moreover, having advocated the message of childhood immunization, government can refuse the donation of a billboard that says, "immunization is a government conspiracy."

The Tenth Circuit's decision ignores these fundamental principles of government speech. It limits the ability of government – at all levels – to use or decline donated property as a means of government expression.[2] Under the lower court's reasoning, if government accepts a donation of property as a means of facilitating its own expression, it must accept all similar donations – even though the other donations convey a message that is tangential or even contradictory to the message that government wishes to convey. As Judge McConnell noted, governments "must either remove the war memorials or brace themselves for an influx of clutter." *Pet. App.* 10f (McConnell, J., joined by Gorsuch, J., dissenting from the denial of rehearing *en banc*.).

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[2] Presumably, the same rationale would apply if the donor sold the property to the government for less than fair market value. Thus, the rule cannot be avoided by selling the property for some nominal amount.

The Constitution does not compel such a result. To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it advances its own agenda "would render numerous Government programs constitutionally suspect." *Rust*, 500 U.S. at 194. "Consequently, the Government may advance or restrict its own speech in a manner that would clearly be forbidden were it regulating the speech of a private citizen."[3] *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045, 1048-49 (2nd Cir. 1988). "If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee." *PETA v. Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005).

REASONS FOR GRANTING THE PETITION

The Petition should be granted for three reasons. First, there is a conflict among the Circuits. Second, the decision below undermines the States' ability to engage in government speech. Third, the Tenth Circuit's decision has implications far beyond the public parks.

[3] *See also Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (State may express official view of state history, but may not force individuals to do so.); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 567 (1973) (act forbidding federal employees from engaging in political activity does not violate First Amendment).

I. THERE IS A CONFLICT AMONG THE CIRCUITS.

The Tenth Circuit decision conflicts with the decisions of other Circuits in two ways. First, the Circuits are divided on whether a donation of property results in government speech or private speech by the donor. Second, the Circuits are divided on whether public parks are a public forum for the erection of monuments.

A. The Circuits Are Divided on Whether a Donation of Property Results in Government Speech or Private Speech by the Donor.

The Circuits are divided on whether a donation of property results in government speech or private speech by the donor. In the Tenth Circuit, when government accepts a donation of property, any speech that subsequently results is speech by the private donor, not speech by the government. *Pet. App.* 7a-9a, 17a-19a.[4] Moreover, if multiple donors wish to convey property, government has no discretion to accept or reject particular pieces of property.

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[4] *See also Summum v. Pleasant Grove City*, 483 F.3d 1044, 1048 n.2 (10th Cir. 2007), *petition for cert. filed* (U.S. Nov. 20, 2007) (No. 07-665); *Summum v. City of Ogden*, 297 F.3d 995, 1003-06 (10th Cir. 2002); *Summum v. Callaghan*, 130 F.3d 906, 919 & n.19 (10th Cir. 1997).

In sharp contrast, other Circuits have concluded that, when government accepts a donation of property, any speech that subsequently results is government speech. *See ACLU Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772, 774, 778 (8th Cir. 2005) (*en banc*) (implicitly assuming that a city's acceptance of a privately donated monument in public park resulted in government speech). When property is transferred from a private party to the government, "the effect of formal transfer of legal title to property [is] a transfer of imputed expression. . . ." *Freedom from Religion Found. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000). If a work of art "is entirely owned by the Government and is displayed on Government property," "the speaker is the . . . Government." *Serra*, 847 U.S. at 1049. Similarly, a religious display "owned and displayed by city government on city government property" is "government speech." *ACLU v. Schundler*, 104 F.3d 1435, 1444 (3rd Cir. 1997). Furthermore, when government chooses to accept some donations, but to reject others, it is engaging in government speech. *PETA*, 414 F.3d at 28-29. Thus, in the D.C. Circuit, the government may choose which privately donated sculptures to install in a public park. *Id.* at 29.

B. The Circuits Are Divided on Whether Public Parks Are a Public Forum for the Erection of Monuments.

The Circuits also are divided on whether public parks are a public forum for the erection of monuments. The Tenth Circuit found that, by allowing the erection of a single monument in a public park, the government creates a public forum for the erection of monuments. *Pet. App.* 9a-11a. Thus, unless the government bans "all permanent displays," *Pet. App.* 18a, it must allow private parties to erect monuments whenever they wish.

Other Circuits have reached the opposite conclusion. *See Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2nd Cir. 1989) (Local government is not required to display a privately funded menorah in a public park.). "There is no private constitutional right to erect a structure on public property." *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993) (*en banc*). "If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures." *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990). "Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved." *Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005).

II. THE DECISION BELOW UNDERMINES THE STATES' ABILITY TO ENGAGE IN GOVERNMENT SPEECH.

Even if there were not a clear, deep, and mature conflict among the Circuits, review by this Court would still be warranted to correct the Tenth Circuit. The decision below undermines the States' ability to engage in government speech.

There is a fundamental difference between private speech that utilizes government resources such as property or money and government speech that advances the government agenda. *Finley*, 524 U.S. at 586. If government makes its property or funds available for private expression, the First Amendment prohibits viewpoint discrimination. *See Rosenberger*, 515 U.S. at 837 (public funds for student groups); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386 (1993) (use of a publicly owned auditorium).[5] In contrast, the expenditure of public funds for government speech generally does not implicate the First Amendment. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005). "Simply because the government opens its mouth to speak does not give every outside . . . group a First Amendment right to play ventriloquist."

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[5] *Cf. Hannegan v. Esquire, Inc.*, 327 U.S. 146, 148 n.1 (1946) (Second class mailing privileges available to all newspapers and other periodicals).

Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1013 (9th Cir. 2000).

The decision below blurs the fundamental distinction between private speech using government resources and government speech. First, under the reasoning of the court of appeals, *all* donations of property to the government that result in expression are considered *private* speech and, thus, implicate the First Amendment. As a practical matter, a particular of government speech – accepting a donation of property and then using that property to convey the government's message – has been abolished. Although government may still pursue other modes of communication, the closure of one mode makes the government expression more difficult.

Second, under the reasoning below, if donated property is erected in a public park, that park is transformed into a public forum where other private parties may erect donated property with expressive attributes. As a practical matter, this means that government can no longer use its own parks to convey its message. While government remains free to speak in other places, the loss of the public park as a venue for government speech makes communication more difficult.

Furthermore, while government speech is inhibited by the Tenth Circuit's decision, there is no reason to believe that private speech will be expanded. As a practical matter, government will respond to the decision by refusing to accept

donations of property. Moreover, faced with a choice of allowing all monuments in public parks or allowing none, many – if not most – governments will opt for none. Thus, the long-term effect of the decision may well be to inhibit private speech. Surely, the Constitution does not require a result that inhibits government speech while not promoting – and possibly undermining – private speech.

III. THE DECISION BELOW HAS SIGNIFICANT IMPLICATIONS BEYOND PUBLIC PARKS.

The implications of the lower court's decision for public parks are obvious. George Washington must stand near Benedict Arnold. Union Generals must be accompanied by their Confederate counterparts. A Holocaust Memorial must be alongside a monument to the Ottoman Empire's Armenian Genocide or the British atrocities during the Boer War, or, for that matter, a monument to honor Adolf Hitler. The applications to public parks alone are sufficient to warrant this Court's review.

Yet, nothing in the Tenth Circuit's opinion limits its rationale to public parks. Its logic extends to any governmental decision that involves the acceptance of property where some form of expression results. Most obviously, the decision applies to government's decisions regarding the contents and décor of government buildings. Since Virginia's Pocahontas

State Office Building[6] contains a privately funded "Wall of Honor" commemorating those Virginians who have died in the War on Terror, it must also include a "Wall of Shame" protesting the War or celebrating the supposed virtues of the Terrorists.[7] Although South Dakota's Capitol Rotunda contains privately donated sculptures of Wisdom, Vision, Courage, and Integrity, the Tenth Circuit would mandate inclusion of other sculptures honoring Stupidity, Cowardice, and Dishonesty.[8]

Less obviously, the mandate extends to all decisions where government accepts property and some sort of expression results. Thus, if a public museum accepts a donation of a painting, it must accept all donations of paintings – even if it regards a painting as inferior art, distasteful, or simply inappropriate for the museum's overall purpose. Similarly, if a public university library accepts a donation of a book, it must accept all donations of books. *Cf. Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871-72 (1982) (libraries have broad discretion in determining what books to add to their collections). Conceivably, acceptance of a private party donation of laboratory

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[6] Virginia names its State Office Buildings after prominent Virginians including Jefferson, Madison, and Monroe.

[7] For a description of the "Wall of Honor," see http://www.vaag.com/PRESS_RELEASES/NewsArchive/052407_Wall.html.

[8] For information and images of the sculptures, see http://www.state.sd.us/state/capitol/capitol/tour/bronze.htm.

equipment, computers, or curricular materials means that the government may never refuse a donation. In time, government will be overwhelmed with mediocre art, unwanted books, and useless equipment. The only way for the government to avoid becoming a "pack rat" is to refuse all donations of art and books.

CONCLUSION

For the reasons stated above, in the Petition itself, and in the other amici briefs supporting the Petitioners, the Petition for Certiorari should be **GRANTED**.

Respectfully submitted,

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